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No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MICHELIN TIRE CORPORATION,
Petitioner

v.

ITCO CORPORATION

and

STATE OF NORTH CAROLINA,
Amicus Curiae

PETITION FOR A WRIT OF CERTIORIARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Is the Fourth Circuit Court of Appeals continuing to adhere to a standard of proof in distributor-termination cases expressly rejected by the Supreme Court in *Monsanto Co. v. Spray-Rite Service Corp.*, ____ U.S. ____ , 104 S.Ct. 1464 (1984)?

2. Does a plaintiff's voluntary dismissal of all federal antitrust causes of action, with prejudice, operate as *res judicata* to bar the assertion of the same claims in a duplicative cause of action, in the same ongoing lawsuit, under a state unfair trade practice statute, which mirrors Section 5 of the Federal Trade Commission Act?

3. Where a non-renewable written contract expired by its own terms, was the trial court correct in dismissing the plaintiff's unfair trade practice claim, based upon *United States v. Colgate & Co.*, 250 U.S. 300 (1919) and *United Roasters, Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985 (4th Cir. 1981), cert. denied 454 U.S. 1054?

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THE

Supreme Court of the United States

OCTOBER TERM, 1984

MICHELIN TIRE CORPORATION,

Petitioner

v.

ITCO CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Michelin Tire Corporation respectfully prays that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Fourth Circuit entered in the proceedings on August 29, 1984 and November 23, 1983.

OPINIONS BELOW

The August 29, 1984 opinion of the Court of Appeals for the Fourth Circuit is recorded at 742 F.2d 170 and is reproduced at Appendix A to this Petition.

The November 23, 1983 opinion of the Court of Appeals for the Fourth Circuit is reported at 722 F.2d 42 and is reproduced as Appendix B to this Petition.

The Final Judgment issued by the United States District Court for the Eastern District of North Carolina is reproduced as Appendix C to this Petition, and the order of the District Court on Summary Judgment motions is reproduced as Appendix D to this Petition.

JURISDICTION

An opinion was entered by the Court of Appeals for the Fourth Circuit on November 23, 1983. A Petition for Rehearing was granted on January 10, 1984, and rehearing was had on April 4, 1984. An opinion followed on August 29, 1984. A timely Petition for Rehearing In Banc was denied on October 2, 1984, with Judge Russell dissenting (Appendix E., *infra*). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This action involves Section 1 of the Sherman Act, 15 U.S.C. § 1, which provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . .

The action also involves North Carolina General Statutes, § 75-1.1(a), which provides:

> Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

The North Carolina statute mirrors Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (a)(1), which provides:

> Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

STATEMENT OF THE CASE

Michelin Tire Corporation (Michelin) markets its tires and tubes in the United Sates through independent dealers who contract with Michelin to provide retail sales and service. Michelin and ITCO Corporation (ITCO) entered into the first of four, one-year sales agreements, by which ITCO became a dealer in Michelin tires, in September of 1974. In December, 1977, Michelin informed ITCO that it had elected not to enter into a new Dealer Sales Agreement with ITCO when the 1977 agreement expired in January of 1978. ITCO thereafter filed this action, stating four causes of action, two alleging violations of Section 1 of the Sherman Act, 15 U.S.C. § 1, one alleging a violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, and one alleging a violation of the North Carolina Unfair Trade Practice Act, North Carolina General Statutes § 75-1.1. Jurisdiction in the District Court was based upon 28 U.S.C. §§ 1337 and 1332.

On July 14, 1982, after four years of discovery, Michelin moved for summary judgment as to all four counts of ITCO's Amended Complaint, and thereafter on August 23, 1982, ITCO moved for partial summary judgment as to count four of its Amended Complaint. Oral arguments on motions for summary judgment were heard by the District Court on November 22, 1982, during which argument the plaintiff voluntarily dismissed its cause of action based on Section 2 of the Sherman Act, with prejudice.

On November 26, 1982, the District Court entered an Order (Appendix D) granting Michelin's motion for summary judgment as to count four of the Amended Complaint involving North Carolina General Statutes § 75-1.1. The Court denied Michelin's motion for summary judgment as to ITCO's claims under Section 1 of the Sherman Act.

Thereafter, on November 29, 1982, ITCO voluntarily moved to dismiss its claims under Section 1 of the Sherman Act (Counts 1 and 2) with prejudice, following which on November 30, 1982 the District Court entered a final judgment dismissing ITCO's causes of action under counts 1, 2, 3 and 4 of the Amended Complaint (Appendix C).

ITCO appealed the District Court's dismissal of its cause of action arising under North Carolina General Statute § 75-1.1, arguing that the Court's denial of Michelin's motion as to Section 1 of the Sherman Act mandated a denial of the motion for summary judgment with respect to the North Carolina Unfair Trade Practice statute.

The Court of Appeals reversed the District Court and held:

1. Evidence of dealer complaints to Michelin supported an inference of conspiracy for purposes of Section 1 of the Sherman Act. (App. B, pp. A-12 through A-13).

2. The plaintiff's voluntary dismissal of its Sherman Act Section 1 cause of action had no *res judicata* effect upon duplicative claims under North Carolina General Statutes § 75-1.1 (App. B, pp. A-15 through A-19).

Following the Order of the Court of Appeals on November 23, 1984, Michelin filed a Petition for Rehearing, which was granted on January 10, 1984. (Appendix F). A rehearing was held on April 4, 1984, following which on August 29, 1984 the Court of Appeals issued a second opinion. (Appendix A). A timely Petition for Rehearing in Banc was denied on October 2, 1984 (Appendix E), with Judge Russell dissenting.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit's conclusion in this case, unchanged despite this Court's decision in *Monsanto Co. v. Spray-Rite Service Corp.*, ____ U.S. ____, 104 S.Ct. 1464 (March 20, 1984), fails to recognize the standards of proof of conspiracy announced in *Monsanto*. Instead, the Court of Appeals adheres to the standards it set forth in *Bostick Oil Co. v. Michelin Tire Corp.*, 702 F.2d 1207 (4th Cir. 1983), cert. denied ____ U.S. ____, a rule of law specifically rejected by this Court in *Monsanto*.

Moreover, as discussed by Judge Russell in dissent, the Fourth Circuit has adopted an interpretation of *res judicata* which, in essence, allows a plaintiff to revive on appeal a cause of action voluntarily dismissed, with prejudice, in the court below.

Finally, the Court of Appeals failed to recognize the impact of *United States v. Colgate & Co.*, 250 U.S. 300 (1919) and *United Roasters, Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985 (4th Cir. 1981), cert. denied 454 U.S. 1054, upon plaintiff's causes of action based upon the bare expiration, by its terms, of a non-renewable written contract.

I.

The opinion of the Court of Appeals rests totally upon ITCO's ability to support an inference of conspiracy under Section 1 of the Sherman Act, measured against the standards the Fourth Circuit announced in *Bostick Oil Co. v. Michelin Tire Corp.*, *supra*. (Appendix B, pp. A-12 through A-13). Because ITCO presented sufficient evidence of dealer complaints to survive a motion for summary judgment for purposes of Section 1 of the Sherman Act under *Bostick*, according to the Court, it must survive summary judgment for purposes of the North Carolina Unfair Trade Practice Act. The Fourth Circuit's reliance on *Bostick Oil Co. v. Michelin Tire Corp.*, *supra*, ignores the recent pronouncement of this Court in *Monsanto Co. v. Spray-Rite Service Corp.*, *supra*.

Subsequent to the original November 2, 1983 opinion of the Fourth Circuit in this matter, this Court decided *Monsanto Co. v. Spray-Rite Service Corp.*, *supra*, in which the Court emphatically concluded that complaints coupled with later termination of the subject dealer do not support an inference of conspiracy under Section 1 of the Sherman Act. In *Monsanto*, the Court cited the Fourth Circuit's opinion in *Bostick Oil Company v. Michelin Tire Corporation*, *supra*, and rejected the standard of proof announced therein. 104 S.Ct. at 1468, footnote 5.

Despite this Court's direction in *Monsanto* that the *Bostick* standard is erroneous, the Fourth Circuit on rehearing failed to assess ITCO's proof against the *Monsanto* standard but adhered to its original opinion and the erroneous *Bostick* rule (Appendix A). The Court held:

> . . .(T)he combination or conspiracy necessary to establish § 1 liability. . . might be founded upon proof that

> Michelin's decision to terminate a dealer was made in response to complaints by rival dealers over price competition generated by the terminated dealer. (Appendix B, pp. A-13 through A-14).

The opinion of the Fourth Circuit is in obvious and unresolvable conflict with the direction of this Court in *Monsanto Co. v. Spray-Rite Service Corp., supra.* The Court there wrote:

> Permitting an agreement to be inferred merely from the existence of complaints, or even from the fact that termination came about "in response to" complaints, could deter or penalize perfectly legitimate conduct. . . Thus, something more than evidence of complaints is needed. There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently. . . (T)he antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others "had a conscious commitment to a common scheme designed to achieve an unlawful objective." 104 S.Ct. at 1470.

The Fourth Circuit required no such showing of the plaintiff here. In reaching its conclusion as to the fate of ITCO's claims of conspiracy, the Fourth Circuit adhered to its conclusions in *Bostick Oil Company v. Michelin Tire Commercial, supra*, and evaluated the evidence of conspiracy against the *Bostick* standard. The Fourth Circuit has in fact ignored the rule of law so recently announced by this Court in *Monsanto Co. v. Spray-Rite Service Corp., supra.*

II.

The *res judicata* issue presented in this action is one of first impression. On the eve of trial, ITCO dismissed its federal antitrust causes of action voluntarily and with prejudice. It then sought to assert, on appeal, under the guise of the North Carolina Unfair Trade Practice Act, N.C.G.S. § 75-1.1, a conspiracy-based cause of action which duplicated the federal antitrust claims dismissed with prejudice in the District Court. As discussed by Judge Russell in

his dissenting opinion, the *res judicata* issue thus becomes whether ITCO's voluntary dismissal of its federal antitrust claims, with prejudice, bars the assertion of the same cause of action in support of its appeal under N.C.G.S. § 75-1.1. Judge Russell concluded that the doctrine of *res judicata* must so operate. He wrote:

> A voluntary dismissal by the plaintiff of his federal action with prejudice made "at any stage of a judicial proceeding" constitutes a final judgment of his claim and, "unless the court has made some other provision is subject to the usual rules of *res judicata*. . ." And this rule of *res judicata* applies whether it is raised in a subsequent action or is asserted on appeal on the same case. This case presents the question whether the judgment in a federal antitrust suit bars on *res judicata* grounds the maintenance of a duplicative state action. I submit that. . . the legal principle applicable in both cases is the same. . . .(A) judgment in the federal antitrust claim bars the identical claim under the North Carolina law and I submit we should so hold. (Appendix B, pp. A-23 through A-25).

Under the majority's holding, ITCO can continue to assert all theories of recovery, including the conspiracy-based theories, despite its voluntary dismissal with prejudice below. ITCO has transformed its voluntary dismissal *with* prejudice into a dismissal *without* prejudice with leave to amend.

The application of *res judicata* as between two claims, but one cause of action, in a single lawsuit has not been decided by this Court. The issue affects the integrity of the doctrines of judicial repose and finality which have been historically protected by this Court. An issue of such importance, Michelin respectfully suggests, warrants determination by this Honorable Court.

III.

Relying solely upon the issue of conspiracy, the Fourth Circuit declined to otherwise rule on the propriety of the District Court's dismissal of ITCO's remaining theories of recovery under the North Carolina Unfair Trade Practice Act (Appendix B, pp. A-13, footnote 10), a statute which mirrors Section 5 of the Federal Trade Commission Act. Under this Court's holding in *United States v. Colgate & Co., supra*, the District Court's ruling should be reinstated.

The Fourth Circuit has failed to recognize the impact of the *Colgate* case, as reinforced by *Monsanto Co. v. Spray-Rite Service Corp., supra*, and its own decision in *United Roasters, Inc. v. Colgate-Palmolive Co.*, 649 F.2d 984 (4th Cir. 1981), cert. denied 454 U.S. 1054, upon ITCO's claims.

Distributor actions based upon the bare expiration, by its own terms, of a non-renewable written contract, fully performed by the manufacturer, are not actionable. *United States v. Colgate & Co., supra.* As the Court wrote in *Monsanto Co. v. Spray-Rite Service Corp., supra*:

> A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes as long as it does so independently. 104 SCt. at 1469.

The Fourth Circuit's opinion fails to recognize the impact of this rule of law upon ITCO's claims. Permitting such a cause of action under a state unfair trade practice statute emasculates the *Colgate* rule and renders the end of every business relationship actionable. The District Court correctly dismissed ITCO's claim.

CONCLUSION

The Fourth Circuit's continuing adherence to a rule of law specifically rejected by this Court in *Monsanto Co. v. Spray-Rite Service Corp., supra*, is a matter of considerable concern to antitrust litigants and District Courts throughout the Fourth Circuit, and the *res judicata* issue is one of first impression. Finally, the integrity of the doctrine of freedom to deal, set forth so clearly in *United States v. Colgate & Co., supra*, is at stake. Petitioner respectfully suggests the issues presented here merit consideration by this honorable Court.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-2177 (L)

ITCO CORPORATION,

Appellant,

v.

MICHELIN TIRE CORPORATION,
COMMERCIAL DIVISION,

Appellee.

and

STATE OF NORTH CAROLINA,

Amicus Curiae/A

No. 82-2178

ITCO CORPORATION,

Appellee,

v.

MICHELIN TIRE CORPORATION,
COMMERCIAL DIVISION,

Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Franklin T. Dupree, Jr., District Judge. (C/A 78-0004)

On Petition for Rehearing:

Argued: April 4, 1984 Decided: August 29, 1984

Before RUSSELL, MURNAGHAN, and ERVIN, Circuit Judges.

Charles Gordon Brown (Jordan, Brown, Price & Wall; John R. Jordan, Jr., Jordan, Brown, Price & Wall; Samuel W. Johnson, Meadows, Johnson & Spinks; John F. Dienelt, Brownstein, Zeidman & Schomer on brief) for Appellants; J. Brantley Phillips, Jr., Natalma M. McKnew (Fletcher C. Mann, Leatherwood, Walker, Todd & Mann; Jerry S. Alvis, Young, Moore, Henderson & Alvis on brief) for Appellee; (Rufus L. Edmisten, Attorney General of North Carolina, H. A. Cole, Jr., Special Deputy Attorney General, John R. Corne, Associate Attorney General on brief) as Amicus Curiae.

PER CURIAM:

The judgment of the district court is reversed, and this case is remanded for reasons stated in the opinion of the original panel. *ITCO Corp. v. Michelin Tire Corp., Commercial Division*, 722 F.2d 42 (4th Cir. 1983). Judge Russell dissents for the reasons stated in his dissent to the panel opinion. 722 F.2d at 53-55.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-2177

ITCO CORPORATION,

Appellant,

v.

MICHELIN TIRE CORPORATION,
COMMERCIAL DIVISION,

Appellee.

and

STATE OF NORTH CAROLINA,

Amicus Curiae/A

No. 82-2178

ITCO CORPORATION,

Appellee,

v.

MICHELIN TIRE CORPORATION,
COMMERCIAL DIVISION,

Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Franklin T. Dupree, Jr., Chief Judge. (C/A 78-0004)

Argued: June 10, 1983 Decided: November 23, 1983

Before RUSSELL and MURNAGHAN, Circuit Judges and BULLOCK,* District Judge.

Charles Gordon Brown (Jordan, Brown, Price & Wall; John R. Jordan, Jr., Jordan, Brown, Price & Wall; Samuel W. Johnson, Meadows, Johnson & Spinks; John F. Dienelt, Brownstein, Zeidman & Schomer on brief) for Appellants; J. Brantley Phillips, Jr., Natalma M. McKnew (Fletcher C. Mann, Leatherwood, Walker, Todd & Mann; Jerry S. Alvis, Young, Moore, Henderson & Alvis on brief) for Appellee; (Rufus L. Edmisten, Attorney General of North Carolina, H. A. Cole, Jr., Special Deputy Attorney General, John R. Corne, Associate Attorney General on brief) as Amicus Curiae.

*The Honorable Frank W. Bullock, Jr., United States District Judge for the Middle District of North Carolina, sitting by designation.

MURNAGHAN, Circuit Judge:

The case affords us a third opportunity to consider the antitrust implications of Michelin Tire Corporation's decision to terminate dealership arrangements with certain of its large dealers. The aggrieved dealer-plaintiff may have differed in each of the cases, but our views on the substantive law have held fast, since the first time, *see Donald B. Rice Tire Co. v. Michelin Tire Corp.*, 638 F.2d 15 (4th Cir. 1981),[1] and since the second time, *see Bostick Oil Co. v. Michelin Tire Corp.*, 702 F.2d 1207 (4th Cir. 1983), *cert. denied*, ____ U.S. ____ , 52 U.S.L.W. 3291 (U.S. Oct. 11, 1983) (No. 83-268),[2] we considered such matters. Cases, however, frequently turn not on the substantive law that must guide decision

[1]In *Donald B. Rice Tire Co. v. Michelin Tire Corp.*, 638 F.2d 15 (4th Cir. 1981), involving a Maryland Michelin dealer, a case decided after a full-scale trial below, not upon summary judgment or directed verdict, we affirmed the district court's judgment in favor of the defendant, Michelin. Rice, like ITCO here, brought suit after Michelin decided to terminate its authorized dealership. We affirmed the judgment in *Rice* for Michelin on the ground that the district court, as the factfinder, could reasonably conclude that, as between Michelin and the party before the court, Rice, the termination was "for the purpose of promoting interbrand competition," 638 F.2d at 17, and thus for a purpose not prohibited by the federal antitrust laws.

[2]In *Bostick Oil Co. v. Michelin Tire Corp.*, 702 F.2d 1207 (4th Cir. 1983), *cert. denied*, ____ U.S. ____ , 52 U.S.L.W. 3291 (U.S. Oct. 11, 1983) (No. 83-268), we reversed and remanded for further proceedings the trial court's granting of a directed verdict for the defendant, Michelin, on the grounds that circumstances required a full-scale explanation of the facts by trial as between Michelin and Bostick Oil Co. As will become increasingly apparent in the course of this opinion, ITCO's claim in the case before us closely parallels, and indeed appears indistinguishable from, Bostick's lawsuit. Bostick, terminated in circumstances similar to those presented here, brought suit alleging that Michelin's decision to terminate the dealership arrangement was a horizontal restraint prohibited by § 1 of the Sherman Act and by the South Carolina Unfair Trade Practices Act, § 39-5-20 (a), Code of Laws of South Carolina 1976. We held:

> It is ultimately, then, a factual issue for the jury to determine whether Bostick was terminated to placate rival dealers objecting to price-cutting [by Bostick], or instead of lack of service facilities as Michelin claims. . . . [A] finding of *per se* violation of § 1 would result from a factual determination that the termination was in furtherance of competitors' desires to eliminate a price-cutting rival.

702 F.2d at 1215. We went on to hold, as well, that Bostick's claim under the South Carolina act necessarily would prevail if the Sherman Act claim prevailed:

> [E]vidence sufficient to withstand a motion for a directed verdict on the federal causes of action provides at least as sufficient a basis for also requiring jury determination of the state law claim. . .It is, of course, proper that the jury be instructed not to award duplicative damages for violations of both the state and federal statutes based upon precisely the same conduct, and the defendant will be free to ask for an instruction to this effect.

702 F.2d at 1220.

but, instead, on their particular procedural countenances. Indeed, the novel and dispositive question facing us, in the end, is one sounding in civil procedure and concerning the scope of the doctrine of *res judicata*.

I

ITCO Corporation, the plaintiff and appellant, is an independent tire distributor whose headquarters are located in Wilson, North Carolina. In the spring of 1974, ITCO responded to advertisements placed by Michelin, the defendant and appellee, which sought dealers for Michelin's radial tires in the United States. At the time, Michelin, a New York corporation whose parent entity is of French origin, was embarking upon a full scale effort to develop markets, a campaign the details of which may be found in the district court opinion in *Donald B. Rice Tire Co. v. Michelin Tire Corp.*, 483 F. Supp. 750, 752-53 (D. Md. 1980), *aff'd*, 638 F.2d 15 (4th Cir. 1981). After several meetings and communications, Michelin and ITCO entered into a standard "Dealer Sales Agreement" dated September 25, 1974. The agreement, which by its terms was to expire automatically at the end of a one-year period, was renewed on April 23, 1975, on January 27, 1976, and on January 27, 1977.

Pursuant to the agreement, ITCO obligated itself to "vigorously and aggressively promote the retail sale of Michelin Products and. . .render prompt, workmanlike and courteous service with respect to Michelin Products including all services to which a purchaser of Michelin Products from any authorized Michelin source may be entitled." The agreement also required that ITCO "establish and maintain a place of business satisfactory to [Michelin] in appearance, size, layout and equipment and at all times be in a position to adequately and professionally service Michelin Products."

On December 22, 1977, ITCO was informed by Michelin that the dealership agreement would not be renewed again. The crucial factual question, as yet unresolved, asks why Michelin decided to

terminate its dealership arrangement with ITCO.[3] It is a factual dispute the resolution of which, as we acknowledged in our *Bostick* decision and in our *Rice* decision, will dictate whether the termination decision constitutes anticompetitive behavior rendered *per se* unlawful under § 1 of the Sherman Act, *see Bostick, supra*, at 1215 (and hence a violation of North Carolina's Unfair Trade Practices Act, N.C. Gen. Stat. § 75-1.1), or, instead, a legitimate business decision with socially beneficial ramifications, *see Rice, supra*, at 17.

Michelin contends, as it did in the *Bostick* case with respect to its termination of Bostick Oil Company as a dealer, that its decision to sever its relationship with ITCO was a unilateral choice stemming solely from a disenchantment with ITCO's performance as a dealer. Specifically, Michelin maintains that ITCO failed to provide any retail tire services in Charlotte, North Carolina, thus falling short of it contractual obligation to sell and service Michelin Products "in a first class manner."

And indeed, ITCO does not contest the fact that the absence of retail services in Charlotte had become a matter of dispute, discussion, and negotiation between the parties. But ITCO steadfastly maintains, as did Bostick Oil Company, that the issue of retail service was an entirely minor concern, and not the real reason underlying Michelin's decision to sever its relationship with the dealer. Rather, ITCO intends to prove, as Bostick intended to prove, that the termination decision was the action of an anticompetitive conspiracy among ITCO's rival dealers and Michelin itself—a combination calculated to fix prices in the retail tire market. According to its own version of the facts, ITCO, as a large and cost-efficient seller of tires both at the retail and wholesale level, could purchase tires in exceedingly large quantities from Michelin. Because of its high-volume purchases, ITCO was able to

[3]On appeal, Michelin advances the argument that the district court resolved this factual dispute, and opted for Michelin's version of the story. The contention mistakes the role of the court in ruling on a motion for summary judgment. The court is not permitted to *resolve* genuine issues of material fact on a motion for summary judgment—even where, as below, both parties have filed cross motions for summary judgment. Where genuine issues of material fact are revealed, the duty of the court is to deny summary judgment and to permit the case to go to trial. *See, e.g., Smith v. University of North Carolina*, 632 F.2d 316, 338 (4th Cir. 1980).

obtain especially lucrative benefits under Michelin's pricing system, which grants price discounts that, generally speaking, rise in tandem with the number of tires purchased by a dealer.[4] According to ITCO's calculations, a dealer able to obtain the full panoply of discounts offered by Michelin could receive an aggregate discount of 44.28 percent off of Michelin's suggested retail prices. While the record is not fully developed at this pretrial stage of the case, it is alleged that ITCO obtained discounts nearing or reaching that maximum figure.

ITCO contends that, by virtue of the discounts it received, it found itself in a competitively advantageous situation vis-à-vis most other authorized Michelin dealers. Not only could ITCO effectively undercut the prices offered by the smaller authorized dealers in the *retail* consumer market, but ITCO also could compete effectively with Michelin itself in the *wholesale* market, on sales to retail tire merchants who had not entered a dealership agreement with Michelin. Both phenomena, it is alleged, drew the ire of ITCO's competitors, authorized dealers who thus faced increased competition on the one hand from ITCO, and on the other hand, from unauthorized retail dealers who purchased tires from ITCO at wholesale prices lower than those offered to the complaining, authorized, dealers by Michelin.

Crucially, for antitrust purposes, it is alleged that ITCO's disenchanted competitors aired their gripes to Michelin in what amounted to a call for protective action from the manufacturer. ITCO directs our attention to a notation made by Michelin's district manager which purportedly logs one such complaint:

---

[4]A discount of as much as 10 percent, called the "quantity shipping allowance," was made available on each shipment, the exact size of the discount dependent upon the size of the order. Another discount, termed the "volume bonus purchase," was given on the basis of the total annual purchases made by the dealer. The discount, it is said, reached a maximum of five percent. A two percent discount was given to those dealers who paid their bills in cash within a certain period of time. And there was a "standard dealer discount" given to every dealer by Michelin. In 1977, the standard discount was 33.5 percent off the suggested retail price.

> Dealer very upset over the large amount of wholesaling taking place in his area. Retail selling prices he claims are floating at 20 to 30% below suggested exchange. Wholesale selling prices are normally at 30 + 5 off.

Michelin responded to the lament of the smaller dealer, ITCO asserts, by deciding to terminate its dealer arrangements with four similarly situated large dealers—ITCO itself, Bostick, Rice, and Englewood Tire Distributors. In support of that contention, ITCO points to a memorandum written by Michelin's district manager, recommending that the manufacturer terminate its dealings with the "large whoesalers" and, in particular, with Bostick:

> I feel that in the long run, we would be better off without the large wholesaler such as Bostick Oil Co., Inc. . . . [T]he overall morale of the rest of our dealers in this area would improve considerably.

The memorandum goes on to suggest, albeit less than directly, that the disenchantment of rival dealers with the price-cutting actions of the "larger wholesalers" figured in the decision:

> Another greater possibility is that another large wholesaler would simply see a great opportunity and pick up where Bostick left off [if Bostick alone were terminated]. Due to this, it would appear to me that if a move is made to get rid of the large wholesalers whom we are in competition with, this move would have to be made throughout other areas as well. In other words, I find it difficult to see how we could ever be selective as just what wholesalers we are going to keep.

In concluding, the memorandum listed the largest wholesalers in the Charlotte, North Carolina district. Bostick was listed. So was ITCO.

Perceiving a colorable claim under the antitrust laws, ITCO brought suit in the United States District Court for the Eastern District of North Carolina, alleging that Michelin's decision to terminate the dealership arrangement presented a conspiracy in restraint of trade prohibited by § 1 of the Sherman Act, 15 U.S.C. § 1. Availing itself of the district court's pendent jurisdiction, *see*

United Mine Workers v. Gibbs, 383 U.S. 715 (1966), and, in the alternative, the court's diversity jurisdiction, 28 U.S.C. § 1332,[5] ITCO also alleged that Michelin's decision constituted a violation of North Carolina's Unfair Trade Practices Act, N.C. Gen. Stat. § 75-1.1. ITCO moved for and obtained a temporary restraining order prohibiting Michelin from implementing its decision to terminate ITCO, thus leaving the parties *in statu quo* while the lawsuit progressed.[6] In the wake of that order, Michelin filed a counterclaim charging ITCO with abuse of legal process, a common law tort under the law of North Carolina. According to Michelin, ITCO sought, obtained, and used the TRO to further an unlawful and abusive purpose.

The parties filed cross motions for summary judgment. Perceiving potential merit in ITCO's Sherman Act claim, the district court denied Michelin's motion and determined that the claim should proceed to trial. The court did, however, grant summary judgment for Michelin on the state unfair trade practices claim. Desirous of an immediate appeal on the defeat of its state law count,[7] ITCO voluntarily dismissed with prejudice its Sherman Act claim so that the district court might then enter a final and appealable judgment. As the record shows, however, ITCO dismissed its federal claim on the understanding that whatever antitrust arguments it might have made under the Sherman Act that also are cognizable under the North Carolina act would remain

[5]The matter, it appears, was not explored in the district court. The record fails to reveal Michelin's principal place of business and, thus, it cannot be said with certainty that the parties are of diverse citizenship.

[6]The TRO was once extended and finally dissolved. ITCO, the record reveals, withdrew its motion for a preliminary injunction that would have supplanted the TRO and extended that order's effects.

[7]A request for certification of the legal issues presented under 28 U.S.C. § 1292 (b) was denied by the district court.

ITCO's purpose in seeking immediate review of the defeat of its state law claim will become increasingly evident as this opinion develops. Suffice it to say that, under ITCO's understanding of the scope of the North Carolina Unfair Trade Practices Act, there is no relief and no legal theory available under the Sherman Act count which would not also be available under the state act. Conversely, however, there might be legal theories to pursue under the state act which the Sherman Act would not recognize. The economics of litigation, along with the not unique desire to go to trial with, as ITCO's counsel put it at oral argument, a full quiver of arrows, prompted ITCO's decision to pursue a prompt appeal.

available in the event of success on appeal and a subsequent trial after remand.

ITCO received summary judgment in its favor on Michelin's abuse of process counterclaim. Both parties have filed notices of appeal on those decisions rendered adversely to their respective interest, and the case is properly before us for resolution.

II

The larger question we must answer in ITCO's appeal is whether the district court was in error when it granted summary judgment for Michelin on ITCO's unfair trade practices claim. That question necessarily entails several subsidiary inquiries.

A

The North Carolina Unfair Trade Practices Act, N.C. Gen. Stat. § 75-1.1, provides broad-sweeping language:[3]

> Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

A private cause of action is made available to an injured party. *See* N.C. Gen. Stat. § 75-16; *Atlantic Purchasers, Inc. v. Aircraft Sales, Inc.*, 705 F.2d 712, 715 (4th Cir. 1983). Especially inviting the attention of potential plaintiffs, in addition to the broad sub-

[3]As we had occasion to point out in *Atlantic Purchasers, Inc. v. Aircraft Sales, Inc.*, 705 F.2d 712, 715 n.3 (4th Cir. 1983), the North Carolina act originally provided that the unfair or deceptive act occur "in the conduct of any trade or commerce." The 1977 deletion of the act's reference to "trade" and broadening of the act's scope to cover acts "in or affecting commerce," has been held to be a substantive change in the act which should not be applied retroactively. *See United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1049, 1057 (E.D.N.C. 1980), *aff'd*, 649 F.2d 985 (4th Cir. 1981).

No significance is attached to the statutory amendment by the parties here on appeal, and we are unable to perceive any significance pertinent to the matters necessary to our decision.

stantive coverage of the act, are provisions for the awarding of treble damages, *see* N.C. Gen. Stat. § 75-16, and, in appropriate cases, attorneys fees, *see* N.C. Gen. Stat. § 75-16.1. *See generally* Note, *Trade Regulation—N.C. Gen. Stat. § 75-1.1—Unfair or Deceptive Acts or Practices in the Conduct of Trade or Commerce*, 12 Wake Forest L. Rev. 484 (1976); Note, *Consumer Protection and Unfair Competition in North Carolina—The 1969 Legislation*, 48 N.C.L. Rev. 896 (1970).

ITCO sets forth several theories under which it believes Michelin could be held liable under the unfair trade practices act, but we need only discuss one of those theories. ITCO asserts that anticompetitive actions which run afoul of the proscriptions of the Sherman Act—in particular, actions in furtherance of a horizontal conspiracy to fix prices—are also actions banned by the North Carolina act. We agree.

Highly persuasive to us is the fact that the substantive provisions of the North Carolina act are reproduced *verbatim* from § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), and that the North Carolina Supreme Court, consistent with that observation, had held that "[b]ecause of the similarity in language, it is appropriate for us to look to the federal decisions interpreting the FTC Act for guidance in construing the meaning of. . . § 75-1.1," *Johnson v. Phoenix Mutual Life Insurance Co.*, 300 N.C. 247, 262, 266 S.E.2d 610, 620 (1980). Of course, it is an accepted tenet of basic antitrust law that § 5 of the Federal Trade Commission Act sweeps within its prohibitory scope conduct also condemned by § 1 of the Sherman Act. *See, e.g., FTC v. Cement Institute*, 333 U.S. 683 (1948); *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922). We are offered, and can perceive, no reason to conclude that, given the opportunity, North Carolina's Supreme Court would construe its state's act any differently. Indeed, we held as much with regard to the South Carolina Unfair Trade Practices Act, § 39-5-20(a), Code of Laws of South Carolina 1976, in our decision in *Bostick*, *supra*, at 1220, an act whose legislative heritage and judicial interpretation closely parallel North Carolina's.

We thus hold that proof of conduct violative of the Sherman Act is proof sufficient to establish a violation of the North Carolina

Unfair Trade Practices Act.[9] It remains for us to determine whether ITCO is entitled to a trial so that it might prove such a theory of liability does indeed apply to Michelin's actions.[10]

In *Bostick, supra*, at 1215, we held squarely on facts indistinguishable from those alleged here that a factfinder could reach a determination that § 1 of the Sherman Act had been violated:

> It is ultimately, then, a factual issue for the jury to determine whether Bostick was terminated to placate rival dealers objecting to price-cutting, or instead for lack of service facilities as Michelin claims. . . .[A] finding of *per se* violation of § 1 would result from a factual determination that the termination was in furtherance of competitors' desires to eliminate a price-cutting rival.

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[9]We thus necessarily reject Michelin's contention that the federal antitrust laws occupy the field and that North Carolina is therefore preempted from making conduct that offends § 1 of the Sherman Act violative of its own laws as well. "Nothing in the nearly century-old history of federal antitrust regulation is cited to us to suggest that Congress has manifested a clear intent to displace state regulation of unfair trade practices." *Bostick Oil Co. v. Michelin Tire Corp.*, 702 F.2d 1207, 1219 (4th Cir. 1983), *cert. denied*, ____ U.S. ____, 52 U.S.L.W. 3291 (U.S. Oct. 11, 1983) (No. 83-268).

Similarly lacking in merit is Michelin's suggestion that state regulation of unfair trade practices that touch upon interstate commerce is rendered unconstitutional by the negative implications that flow from the Commerce Clause. "Not every exercise of state power with some impact on interstate commerce is invalid." *Edgar v. MITE Corp.*, 50 U.S.L.W. 4767, 4771 (U.S. June 23, 1982) (No. 80-1188). Absent some reason to believe that the North Carolina act is an attempt directly to regulate interstate commerce, and is not an act designed to address primarily local concerns which happens to have an occasional incidental, but not excessive, effect upon interstate commerce, we perceive no cause for constitutional concern.

[10]That is not to say, of course, that there are not other theories under which ITCO might prevail on its unfair trade practices claim. Indeed, the prohibitory scope of the North Carolina act, as we recently noted in *Atlantic Purchasers, Inc. v. Aircraft Sales, Inc.*, 705 F.2d 712, 715-16 (4th Cir. 1983), is potentially quite broad. *See also* Note, *Consumer Protection and Unfair Competition in North Carolina—The 1969 Legislation*, 48 N.C.L. Rev. 896, 908-09 (1970).

"Unfairness" and "deceptiveness" are prohibited. "A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. . . . An act or practice is deceptive. . .if it has the capacity or tendency to deceive." *Johnson v. Phoenix Mutual Life Insurance Co.*, 300 N.C. 247, 263-65, 266 S.E.2d 610, 621-22 (1980).

ITCO has pressed other theories—among them, harsh dealing contrary to good faith and unfair competition under the common law. Without in any way opining upon the merit *vel non* of ITCO's additional theories, we merely note that the presence of a single potentially meritorious theory of recovery is enough to compel a reversal of the judgment below and remand for trial.

That holding was a reiteration of our decision in *Rice* that the combination or conspiracy necessary to establish § 1 liability, *see, e.g., United States v. Parke, Davis & Co.*, 353 U.S. 29 (1960), might be founded upon proof that Michelin's decision to terminate a dealer was made in response to complaints by rival dealers over price competition generated by the terminated dealer. As we acknowledged in *Rice, supra*, at 16:

> [W]e think it is important to distinguish between a conspiracy among dealers and their supplying manufacturer for the purpose of retail price maintenance that would benefit the dealers and one involving the same parties but redounding primarily to the benefit of the manufacturer as a result of increased interbrand competition. A restraint imposed by the former conspiracy would be horizontal in nature and *per se* illegal, while the one imposed by the latter would be vertical and analyzed under the rule of reason.

On the basis of that authority, we are led inexorably to the conclusion that there is an antitrust theory under which ITCO might proceed which, being cognizable under § 1 of the Sherman Act, perforce could ground Michelin's liability under the state unfair trade practices act. As our decisions in *Bostick* and *Rice* make abundantly clear, the success of that theory hinges upon proof satisfactory to convince the factfinder that Michelin's decision to terminate its relationship with ITCO was a step in furtherance of a conspiracy to lessen price competition at the dealer level. The evidence previously essayed in this opinion—the same evidence introduced in the aborted trial in *Bostick* and held, on appeal, to have raised a factual question for the jury—raises a genuine issue of fact to be resolved in a trial on the merits. Of course, what the resolution of that factual issue will ultimately be we do not know, and do not intimate. Here we have had occasion only to consider ITCO's case in its strongest posture. We have not dealt with the evidence to the contrary which Michelin may be expected to muster.

C

There being manifest a genuine issue of fact material, indeed, crucial, to ITCO's state law claim, it follows that the district court incorrectly granted summary judgment for Michelin on that claim and that the judgment must be reversed.[11]

Michelin maintains, however, that a remand for trial on ITCO's price-fixing theory is impermissible. It is asserted that ITCO, having dismissed its Sherman Act claim with prejudice in

[11]A comment on the choice of North Carolina law is in order. Michelin contends that the law of New York, and not the law of North Carolina, should apply to the conduct at issue here. Of chief import to Michelin's argument is a contractual choice of law provision in the Dealer Sales Agreement providing:

> The parties hereto intend this Agreement to be executed as a New York agreement and to be construed in accordance with the laws of the State of New York.

On the basis of that provision, Michelin maintains that the North Carolina Unfair Trade Practices Act has no application to this case.

Federal courts, when exercising their diversity or pendent jurisdiction over state law claims, must of course, apply the choice of law rules applicable in the forum state. *E.g., Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941). The district court in this action, then, would be bound to look to the choice of law rules applicable in North Carolina's state courts.

We are satisfied that North Carolina's courts would apply N.C. Gen. Stat. § 75-1.1 to the facts presented here without regard to the presence of the contractual choice of law provision. The nature of the liability allegedly to be imposed by the statute is *ex delicto*, not *ex contractu*. No issue of contractual construction, interpretation, or enforceability is raised by this case. The liability alleged is predicated, rather, upon actions separate and distinct from the Dealer Sales Agreement itself.

The contractual provision thus set aside, we are left with the recent decision of *Lloyd v. Carnation Co.*, 61 N.C. App. 381, , 301 S.E.2d 414, 418 (1983), wherein the North Carolina Court of Appeals indicated that the law of the state where the injuries are sustained should govern. In *Lloyd*, plaintiff's claim under § 75-1.1 was denied on choice of law grounds, the court holding that Virginia law should apply. The court cited for that proposition the case of *Shaw v. Lee*, 258 N.C. 609, 129 S.E.2d 288 (1963), wherein it was observed that "claimant's right to recover and the amount which may be recovered for personal injuries must be determined by the law of the state where the injuries were sustained; if no right of action exists there, the injuried party has none which can be enforced elsewhere." *Id.* at 610, 289.

Manifestly the injuries sustained by ITCO, a North Carolina corporation with its principal place of business in North Carolina, were sustained in the state of North Carolina. *Cf. Vishay Intertechnology, Inc. v. Delta International Corp.*, 696 F.2d 1062, 1065 (4th Cir. 1982): "Since a course of action is considered to arise where damage occurs, . . .[the plaintiff's] location in North Carolina establishes the first requirement (that "the cause of action arose in North Carolina")." North Carolina's law on unfair trade practices, accordingly, would apply.

order to obtain this appellate correction of the district court's erroneous decision on the state law claim, should now be barred under the doctrine of *res judicata* from advancing, under the guise of the North Carolina act, what in essence is the Sherman Act claim already dismissed voluntarily.

We are of the opinion that an application of *res judicata* on the facts of this case would stretch the doctrine past its breaking point. The doctrine of *res judicata* serves laudable purposes. Representing society's interest in the finality of judgments, the doctrine also is a manifestation of society's interest that all related claims and alternative legal theories for recovery[12] are brought together in one lawsuit. Sufficient encouragement to litigants who might otherwise fail to proceed in such economical fashion is provided by the risk that claims and theories unraised in the first litigation may be lost forever. As perhaps the leading commentary on federal procedure summarizes:

> The doctrine of res judicata is not a technical rule, but a rule of fundamental repose for both society and litigants. Its salutary principle "is founded upon the generally recognized public policy that there must be some end to litigation and that when one appears in court to present his case, is fully heard, and the contested issue is decided against him, he may not later renew the litigation in another court." *The doctrine prevents an encore and "reflects the refusal of law to tolerate needless litigation."*

1B J. Moore & T. Currier, *Moore's Federal Practice* ¶ 0.405, at 628 (2d ed. 1982) (footnotes and citations omitted) (emphasis supplied).

With those words in mind, it is at least a little ironic that Michelin argues for an application of *res judicata* here, where ITCO's decision to dismiss its Sherman Act claim appears to have been in furtherance of the doctrine's purpose in curbing needless litigation. Had ITCO *not* dismissed its federal claim and *not* sought an appeal, but, instead, taken its Sherman Act claim to trial, the prospect of wastefully duplicitous litigation would have arisen.

[12]Or, if attention is turned to the defendant in a lawsuit, counterclaims and defenses.

Suppose, for instance, that the factfinder at that hypothesized trial were to reject ITCO's allegation of a price-fixing conspiracy, a possibility we implicitly recognized in *Bostick*. Michelin, in that event, would be entitled to a judgment in its favor. ITCO, on the ensuing appeal, would be free to challenge the correctness of the summary judgment granted Michelin on the state law claim. It is entirely possible that, given such a procedural posture compelling us to consider the alternative theories of § 75-1.1 liability advanced by ITCO,[13] we might conclude that ITCO should have been permitted a trial on any one or more of those alternative theories. A reversal, a remand, and a second trial in its entirety would thus be required. Countless witnesses and documents would have to be marshalled and presented a second time. Valuable judicial, witness, juror, and attorney time would be needlessly consumed.[14]

Only an application of *res judicata* in a fashion which has lost sight of that doctrine's underlying principles and purpose could prevent ITCO from pursuing its price-fixing theory on remand as a legitimate theory of liability under § 75-1.1. And, as a consideration of the evidence will show, only a hard-hearted lack of appreciation for basic notions of justice and fair play could do so. The record leaves no room for doubt—ITCO, Michelin, and the district judge all proceeded upon the understanding that the price-fixing theory would be preserved in the event of a successful, for ITCO, disposition of this appeal.

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[13]*See* n.10, *supra*.

[14]Counsel for ITCO put it this way in the district court:

> [W]e are in somewhat of an unusual situation because we do feel that the central claim on which we have been conducting our discovery and preparing our case for the last four years has now been put beyond us. . ..
>
> But, Your Honor, we now face again this practical problem of the possibility of a couple of trials or the impact of an adverse decision, either on directed verdict or from the jury in this case on the Section 1.
>
> With all of that being considered, I think that the best course for our client, perhaps the best course again for all of the parties and the Court, is to put all our eggs in one basket for purposes of this case and the only way I think we can do that now, mindful of the economies that we lawyers must work with on this side of the room, is to ask the Court to dismiss Counts 1 and 2 from this case so that we might finally have an appealable order from this Court, so that we might then proceed to, by hook or crook, get the Fourth Circuit to rule one way or the other on our claims.

Counsel for ITCO asked the trial court to specifically condition the dismissal on such an understanding:

> In asking for this dismissal we want to make especially sure that we point out to the Court that we are not asking for a dismissal that will in any way affect the Chapter 75 claim; again, while we would not be trying to seek liability under the Section 4 of the Clayton Act and therefore Section 1 of the Sherman Act after this claim is dismissed, we would reserve again the right to prove a conspiracy that would in fact violate Section 1 which then could be used as a basis for liability under Chapter 75.
>
> . . .
>
> . . .[W]e. . .move that it be dismissed with prejudice, again with, hopefully, carefully worded language that preserves to us the full orbit of Chapter 75 liability which would include proof of Section 1 conspiracy—

The district judge responded:

> Well, I stated before on that that I don't see that this dismissal at all has anything to do with the relevancy of any evidence that would have been available to you under your Section 1 claim as against a Chapter 75 claim. . .. I see nothing to prohibit your going ahead and proving that claim with whatever relevant evidence is available to you.

Furthermore, in response to a query for clarification from counsel for Michelin, the district judge explained:

> I understand the effect of the plaintiff's motion to dismiss. . .with prejudice to mean that this plaintiff does not desire to litigate in this or any other court those two counts again; and that the judgment rendered on his motion allowing it will be with prejudice and be non-appealable. But *he is reserving his right to bring witnesses here who would have testified to facts which had they been within the context or the ambit of a*

> *Section 1 claim would also be relevant on the Chapter 75 claim. And I have told him and you that in my opinion the fact that he takes a dismissal with prejudice on a cause of action does not preclude his use of evidence which would have been favorable to him in that cause of action had it gone to trial.*

(emphasis supplied). Michelin's counsel understood:

> Put simply, not to litigate those facts applicable to the Sherman Act claims unless they would have been independently relevant to Chapter 75.

It comes as no surprise that Michelin has been unable to direct our attention to a single decision according *res judicata* effect to the dismissal of one alternative claim in a single lawsuit to another alternative claim *in the same suit.*[15] Such an application of *res judicata* would defeat the very purposes the doctrine is intended to serve.

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[15]Michelin places great, but wholly unjustified, reliance upon *Nash County Board of Education v. Biltmore Co.*, 640 F.2d 484 (4th Cir. 1981). We held in *Nash* that a consent agreement reached in one lawsuit should be accorded *res judicata* treatment in a subsequent lawsuit alleging, for all intents and purposes, the same claim:

> The only differences between this action and the earlier action were (1) that this suit was based on the federal antitrust act and the earlier suit has based its legal claim on the state antitrust act and (2) the plaintiff in this later suit sought only treble damages but no injunctive relief. . . .The two suits allege the same wrongful act, the same illegal price-fixing conspiracy, the same operative facts in support of such conspiracy. The state and federal statutes upon which the two actions are based are identical in language except in the requirement of the federal statute, but not of the state statute, of a showing of interstate commerce.

Id. at 486, 488.

The correctness of that holding may be accepted unequivocally. But unlike the case here, *Nash* involved *two lawsuits*—a first and a second suit—and this raised the very policy concerns which the doctrine of *res judicata* is geared to address. Duplicitous litigation was presented as an evil to be avoided by *application* of the doctrine in *Nash*. The same evil is to be avoided in this case by *refusing to apply* the doctrine.

Indeed, in setting forth the "essential elements of the doctrine," the *Nash* court listed as two of the requisites: "(1) a final judgment in the merits *in an earlier suit*, [and] (2) an identity of the cause of action in *both the earlier and the later suit.*" *Id.* at 484 (emphasis supplied).

Stating the formal requirements for applicability of the doctrine of *res judicata* in that way makes perfect sense, for it is only where more than one lawsuit is involved that society's interests in the finality of a judgment and the avoidance of duplicitous litigation are implicated.

III

A remand, consequently, is mandated so that ITCO may pursue its state law claim in a trial on the merits. With respect to Michelin's appeal, we similarly must reverse the district court's order granting summary judgment for ITCO on Michelin's counterclaim and remand that claim for further proceedings.

"[W]hen the plaintiff. . .wrongfully perverts or abuses the processes of the court to coerce something for which the process was not intended, the court is warranted in granting relief to the victim of such coercion. . .by recognizing an action for the tort of abuse of process." *Austin v. Wilder*, 26 N.C. app. 229, 233, 215, S.E.2d 794, 797 (1975). As the North Carolina Supreme Court stated in *Estates v. Bank*, 171 N.C. 579, 582, 88 S.E. 783, 784 (1916):

> It seems to us to be beyond question that one who wantonly, maliciously, without cause, commences a civil action, and puts upon record a complaint and a *lis pendens*, for the purpose of injuring and destroying the credit and business of another, whereby that other suffers damages, must be liable for the legal consequences.

Bearing firmly in mind that controverted issues of fact are specifically *not* to be resolved on summary judgment, *see Smith v. University of North Carolina*, 632 F.2d 316, 338 (4th Cir. 1980), we perceive a genuine issue of fact material to Michelin's counterclaim. Michelin contends that "the real reason ITCO filed suit and obtained a TRO was to be able to run a 'clearance' sale on Michelin tires to solve ITCO's documented cash flow deficit, and avoid paying Michelin for the tires it had used for the 'sale' in the process [*i.e.*, tires obtained from Michelin after the TRO was entered]." Convincing the factfinder that ITCO truly instigated suit and sought a TRO for the reason alleged may or may not be difficult for Michelin to accomplish; that is a matter upon which we express no opinion. It is sufficient to note that the evidence thus far adduced give rise to an unresolved factual question concerning the motives and justifications underlying ITCO's decision to bring suit and, in particular, to seek the TRO which enabled it to continue to receive tires from Michelin—tires for which, for some time, ITCO had not

paid Michelin. A fact to be assessed, in that regard, is ITCO's subsequent losing of interest in maintaining its relationship with Michelin under the TRO; as observed earlier, ITCO withdrew a motion for a preliminary injunction, thus allowing the TRO to expire by its own terms.

IV

It is perhaps a subject of too frequent reminder that antitrust cases are oftentimes poorly suited to disposition by way of summary judgment. This being such a case, we reverse and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

RUSSELL, CIRCUIT JUDGE, DISSENTING:

I dissent. I shall attempt to state my reasons briefly. To do so, however, requires some summarization of the circumstances under which the issue in this appeal arose.

This is an action in which federal jurisdiction was predicated on a claim of federal antitrust violations under the Sherman Act, to which was appended pendent actions under the North Carolina Unfair Trade Practices Act. There had been considerable discovery and both parties had filed motions for summary judgment. The motion by the defendant Michelin for summary judgment against the actions under the State Unfair Trade Practices Act was granted and Michelin's motion for summary judgment on the Sherman Act counts was denied. The plaintiff sought of the district court the certification for a preliminary appeal under § 1292(b), 28 U.S.C., of the grant of summary judgment in favor of Michelin on the State claims. This request was denied. The plaintiff then moved to dismiss its Sherman Act action without prejudice. The district court refused to grant dismissal without prejudice. In so ruling, the Court said:

> "Well, I would not dismiss the case without prejudice. That would be simply to allow the 1292 motion in effect and give the plaintiff leave to amend.
>
> "I think that having come this close to trial and having made all these preparations and the Court having invested all of this time and being at least as conversant with it now I think as I will ever be during the course of another trial preparation that it would not be appropriate to dismiss the case without prejudice and I will not do that.
>
> "At the same time I will not ask you to move for dismissal, knowing that; in other words, you can withdraw your motion if you want to. I'm not going to hold that against you."

To that ruling, with its permission to the plaintiff to withdraw its motion for dismissal of its antitrust action if it chose, plaintiff's counsel responded:

> "Well, your Honor, in that case we will withdraw my motion for dismissal without prejudice and move that it be dismissed with prejudice, again with, hopefully, carefully worded language that preserves to us the full orbit of Chapter 75 liability which would include proof of Section 1 conspiracy—"

At that point, the Court said:

> "Well, I stated before on that that I don't see that this dismissal at all has anything to do with the relevancy of any evidence that would have been available to you under your Section 1 claim as against a Chapter 75 claim. I say, I'm not ruling on it now but I see nothing to prohibit your going ahead and proving that claim with whatever relevant evidence is available to you.
>
> "The fact that once you would have used the same evidence in support of a different type cause of action I don't think would be held against you."[1]

Thereafter a formal order of judgment dismissing with prejudice the plaintiff's federal antitrust claim was entered. A voluntary dismissal by the plaintiff of his federal action with prejudice made "at any stage of a judicial proceeding" constitutes a final judgment

[1] I do not read this language of plaintiff's counsel as supporting the conclusion that the plaintiff "dismissed its federal claim on the understanding that whatever antitrust arguments it might have made under the Sherman Act that also are cognizable under the North Carolina Act would remain available in the event of success on appeal and a subsequent trial after remand." What counsel actually said in submitting his motion, as shown in the above quote of his language, was that "hopefully" the order for judgment of dismissal with prejudice would include "language that preserves to us the full orbit of Chapter 75 liability which would include proof of Section 1 conspiracy. . . ." I have also quoted the Court's response to this request. In this response, the Court made it plain that, "I'm not ruling on" whether "this dismissal at all has anything to do with the relevancy of any evidence that would have been available to you under your Section 1 claim as against a Chapter 75 claim." That language, it would seem, does not justify a finding that there was any "understanding" on the effect of the dismissal; there could have been no such understanding in view of the District Court's categorical statement that he was "not ruling on" that question. Moreover, when the Court entered its formal judgment, it did not include any "carefully crafted" language that set forth any such understanding or ruling that included "language that preserve[d] to [the plaintiff] the full orbit of Chapter 75 liability . . . ." Under those circumstances the order of judgment granting the motion by the plaintiff to dismiss the federal antitrust action with prejudice gave rise to *res judicata*.

of his claim and, "unless the court has made some other provision is subject to the usual rules of res judicata. . . ." 9 Wright and Miller, *Federal Practice & Procedure*, § 2367, pp. 185-86 (1971). This is both the federal and the state rule. *Astron Industrial Associates, Inc. v. Chrysler Motors Corp.*, 405 F.2d 958, 960-61 (5th Cir. 1968); *Barnes v. McGee*, 21 N.C.App. 287, 204 S.E. 2d 203, 205 (1974). And this rule of *res judicata* applies whether it is raised in a subsequent action or is asserted on appeal in the same case. *Bostick Oil Co. v. Michelin Tire Corp.*, 702 F.2d 1207, 1218, n.22 (4th Cir. 1983), *cert. denied*, ____ U.S. ____, 52 U.S.L.W. 3291 (U.S. Oct. 11, 1983) (No. 83-268). In that case, the Court said:

> "Bostick advanced two other Unfair Trade Practices Act-based theories which are no longer tenable in this case. One was that Michelin fraudulently induced Bostick to enter the National Accounts program, a claim identical to that dismissed with prejudice below by agreement of the parties. We think that Bostick is foreclosed from reopening its fraud claim under a different heading here on appeal."

Assuming, therefore that the plaintiff's federal antitrust case is barred on principles of *res judicata*, the real issue in this case is the effect of that bar upon the plaintiff's state action. In *Nash Cty. Bd. of Ed. v. Biltmore Co.*, 640 F.2d 484 (4th Cir. 1981), *cert. denied*, 454 U.S. 878, we had occasion to examine the North Carolina Unfair Trade Practices statute in relation to the federal antitrust law. We found that basically there was identity in the two statutes. The precise question in *Nash* was whether a dismissal with prejudice of the state antitrust action barred on *res judicata* grounds a later federal antitrust action. We held that it did. This case presents the question whether the judgment in a federal antitrust suit bars on *res judicata* grounds the maintenance of a duplicate state antitrust action. I submit that, while this case presents the opposite situation to *Nash*, the legal principle applicable in both cases is the same. If, as we held in *Nash*, the judgment in the state antitrust action barred the later federal antitrust action, it is equally logical and compelling that a judgment in the federal

antitrust claim bars the identical claim under the North Carolina law and I submit we should so hold.[2]

This ruling would not mean that, to the extent that the North Carolina law includes provisions additional to and different from those that duplicate the federal antitrust statute, plaintiff's right to recover under those additional and different provisions of the North Carolina statutes would not be barred, and I agree with the majority opinion that the summary judgment of the District Court dismissing such actions, if any exist, should be reversed; but it does mean that any *right* of action under that part of the North Carolina statute which is similar to the federal antitrust actions which were dismissed with prejudice would be barred.

Since my opinion on the rights of the parties and the proper disposition of the appeal in the particulars as outlined above, differs with the majority, I dissent.

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[2]For an excellent comment on *Nash*, *see* Note, *The Res Judicata Effect of Prior State Court Judgments in Sherman Act Suits: Exalting Substance Over Form*, 51 Fordham L.Rev. 1374 (1983).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILSON DIVISION

ITCO Corporation, *Plaintiff*	)	NO. 78-04-CIV-8
vs.	)	Final Judgment
Michelin Tire Corporation, Commercial Division, *Defendant*	)	

The defendant's motion for summary judgment as to Count IV of plaintiff's amended complaint based upon the alleged violation of Section 75-1.1 of the North Carolina General Statutes having been allowed by order entered November 26, 1982, the plaintiff made an oral motion at the pre-trial conference held today for leave to take an interlocutory appeal from this ruling pursuant to 28 U.S.C. § 1292 (b) and to stay further proceedings in the action pending action by the Fourth Circuit on the court's certification under this statute. This motion was denied whereupon counsel for plaintiff moved for leave to take a voluntary dismissal without prejudice as to Counts I and II of the amended complaint based on alleged violations of Section 1 of the Sherman Antitrust Act. When this motion was denied counsel for plaintiff renewed the motion to dismiss Counts I and II of the amended complaint with prejudice, and this motion was allowed.

In view of the fact that plaintiff had not resisted defendant's motion for summary judgment as to Count III of the amended complaint based upon the alleged violation of Section 2 of the Sherman Antitrust Act at the hearing on all motions held herein on November 22, 1982, counsel for plaintiff agreed that Count III of the amended complaint should be dismissed with prejudice leaving as the only appealable ruling of the court on the various summary judgment motions that portion of the November 26, 1982 order which allowed defendant's motion for summary judgment as to Count IV of the amended complaint based

upon the alleged violation of Section 75-1.1 of the North Carolina General Statutes.

Plaintiff's motion for summary judgment as to the first counterclaim of the defendant set forth in its answer and counterclaim filed November 17, 1980 and based upon the alleged abuse of process by the plaintiff in the maintenance of this action was allowed by the order of November 26, 1982.

It was further agreed by counsel for plaintiff in open court that judgment might be entered in favor of the defendant on its claim in the amount of $1,493.86 for freight charges incurred by the defendant in connection with the return by plaintiff to defendant of a portion of its inventory of Michelin tires following the non-renewal of the dealer sales agreement between plaintiff and defendant.

On the basis of the foregoing it is now

ORDERED, ADJUDGED AND DECREED:

1. That Counts I, II and III of plaintiff's amended complaint based upon the alleged violations of Sections 1 and 2 of the Sherman Antitrust Act be and the same are hereby dismissed with prejudice.

2. That Count IV of plaintiff's amended complaint based upon the alleged violation of Section 75-1.1 of the North Carolina General Statutes be and the same is hereby dismissed without prejudice to the plaintiff's right to appeal from this ruling.

3. That the first counterclaim of the defendant as set forth in its answer and counterclaim filed November 17, 1980 and based upon the alleged abuse of process by the plaintiff in the maintenance of this action be and the same is hereby dismissed without prejudice to the right of the defendant to appeal from this ruling.

4. That the defendant have and recover of the plaintiff the sum of ONE THOUSAND FOUR HUNDRED NINETY-THREE AND 86/100THS ($1,493.86) DOLLARS with prejudgment interest thereon at the rate allowable under the applicable North Carolina law from December 13, 1979 to the date of the docketing of this judgment and interest on the judgment from the date of its docketing at the rate allowable under North Carolina law.

5. That the protective orders of this court relating to the confidentiality of all materials developed by the parties during the course of discovery shall remain in full force and effect, but this ruling shall not preclude the inclusion in the record on appeal of all such discovery materials deemed necessary by the parties to be included in the record and briefs on appeal.

Let the plaintiff pay the costs of the action to be taxed by the Clerk.

F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

November 29, 1982.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILSON DIVISION

ITCO Corporation, *Plaintiff*	)	NO. 78-04-CIV-8
vs.	)	Order on Summary Judgment Motions
Michelin Tire Corporation, Commercial Division, *Defendant*	)	

Following the hearing held on November 22, 1982 on all outstanding motions in this antitrust case the court now makes the following rulings:

1. The motions of defendant to preclude the use by plaintiff of certain witnesses, evidence and data are allowed in part and denied in part as follows:

a. The motion to preclude the use by plaintiff for purposes of opposing defendant's motion for summary judgment materials of record in *Donald B. Rice Tire Company v. Michelin Tire Corporation*, 483 F.Supp. 750 (D.Md. 1980), and *Bostick Oil Company, Inc. v. Michelin Tire Corporation*, C/A No. 78-837-5 (D.S.C. 1981), is denied without prejudice to defendant's right to object to the introduction of all or any portion of such evidence and data at the trial of this action.

b. Defendant's motion to preclude the use by plaintiff of its expert witness, Thomas Johnson, is denied.

c. Defendant's motion to preclude the use by plaintiff of its expert witness, George Edwards, is sustained.

2. Defendant's motion for summary judgment as to Counts I and II of the amended complaint based on alleged violations of Section 1 of the Sherman Antitrust Act is denied.

3. Defendant's motion for summary judgment as to Count III of the amended complaint based upon the alleged violation of Section 2 of the Sherman Antitrust Act is allowed.

4. Defendant's motion for summary judgment as to Count IV of the amended complaint based upon the alleged violation of Section 75-1.1 of the North Carolina Carolina General Statutes is allowed.

5. Plaintiff's motion for summary judgment as to the First Counterclaim of the defendant set forth in its answer and counterclaim filed November 17, 1980, and based upon the alleged abuse of process by the plaintiff in the maintenance of this action is allowed.

By previous order of the court a motion of the defendant to bifurcate the trial of this action was denied without prejudice to the right of the defendant to renew the motion should it thereafter appear that the ruling should be reconsidered by the court. On its own motion the court has reconsidered this previous ruling in the light of the record as it has been developed and is now of the opinion that the trial should be bifurcated. Accordingly the trial will be conducted in two phases, one on the liability issue and, if necessary, the other on the damages issue. Trial of the first phase will begin as presently scheduled on December 6, 1982, at 10:00 a.m. in Courtroom No. 1, Seventh Floor, Federal Building, Raleigh, North Carolina. Defendant's motion to continue the trial is denied.

SO ORDERED.

F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

November 26, 1982.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-2177 (L)

ITCO Corporation,

Appellant,

versus

Michelin Tire Corporation,
Commercial Division,

Appellee.

and

State of North Carolina,

Amicus Curiae/A

No. 82-2178

ITCO Corporation,

Appellee,

versus

Michelin Tire Corporation,
Commercial Division,

Appellant.

Appeals from the United States District Court for the Eastern District of North Carolina, at Raleigh. Franklin T. Dupree, Jr., District Judge.

The appellees' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Ervin, with the concurrence of Judge Murnaghan. Judge Russell dissents.

For the Court,

JOHN M. GREACEN
CLERK

APPENDIX F

STATEMENT OF CORPORATE AFFILIATION

Pursuant to Rule 28, Michelin Tire Corporation makes the following disclosure:

> Petitioner is an indirect subsidiary of Compagnie Generale des Establissements Michelin, a French entity in the nature of a commanditory partnership whose non-voting stock is listed on the Paris Bourse (stock exchange). This entity does not do business in the United States nor are its securities traded in the United States to the Appellee's knowledge.

Entered at the direction of Judge Ervin, with the concurrence of Judge Murnaghan. Judge Russell dissents.

For the Court,

JOHN M. GREACEN
CLERK

APPENDIX F

STATEMENT OF CORPORATE AFFILIATION

Pursuant to Rule 28, Michelin Tire Corporation makes the following disclosure:

> Petitioner is an indirect subsidiary of Compagnie Generale des Establissements Michelin, a French entity in the nature of a commanditory partnership whose non-voting stock is listed on the Paris Bourse (stock exchange). This entity does not do business in the United States nor are its securities traded in the United States to the Appellee's knowledge.

APPENDIX G

CERTIFICATE OF SERVICE

This is to certify that three copies of the Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit were served upon opposing counsel this 27th day of December, 1984, by depositing in the U.S. Mail, with proper postage affixed, addressed to:

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Jordan, Brown, Price & Wall
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Charles Gordon Brown
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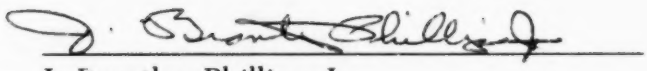

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